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IN THE

Supreme Court of the United States

October Term, 1962

No. 1063

WM. H. SIMMONS, *Petitioner*,

THE STATE OF WASHINGTON, on the Relattion of Charles O. Carroll, Prosecuting Attorney for the County of King, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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IN THE

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No.

WM. H. SIMMONS, *Petitioner*,

v.

THE STATE OF WASHINGTON, on the Relation of Charles O. Carroll, Prosecuting Attorney for the County of King, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Petitioner herein respectfully asks for review, through Certiorari, of that Judgment of the Supreme Court of the State of Washington wherein Petitioner's appeal from a trial court's summary judgment forfeiting his claim to his public judicial office and ousting him therefrom was denied, and shows this Court as follows:

OPINIONS BELOW

No formal opinion was written by the trial court; that is, the Superior Court of the State of Washington. The Supreme Court of Washington, on appeal, rendered a decision which has not, as yet, been officially reported in a bound volume of the state reports.

it may, however, be found in the National Reporter system as *State v. Simmons* 377 P. 2nd 421. This opinion appears in full in the Appendix hereto.

JURDISDICTION

(a) Grounds: The jurisdiction of the United States Supreme Court is invoked on Federal Constitutional Grounds, viz: Failure of the Washington Supreme Court to uphold the provisions, of Article I, Section 10, as the same relates to bills of attainder and Amendment XIV, Section 1, as the same relates to procedural and substantive due process and equal protection of the laws and to strike down a state statute; i. e., RCW 9.92.120 in conflict therewith. These precise issues were properly preserved and presented to the Washington Court.

(b) Date of Judgment: The date of entry of the Judgment sought to be reviewed is January 28, 1963.

(c) Statutory Provisions: Title 28, Section 1257 confers jurisdiction to review this matter by Writ of Certiorari.

QUESTIONS PRESENTED

(a) Does the following Washington Statute:

> "The conviction of public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state." (Revised Code of Washington 9.92.120

do violence to the provisions of Article I § 10 of the United States Constitution, as the same relates to

states passing bills of attainder? Particularly, as in the instant case, where the statute was summarily enforced and the alleged conviction forming the basis for the operation of the statute was suffered to flow from a proceeding wherein there was no semblance of a fair trial? (See argument, infra)

(b) Does enforcement of the above statute as a self-executing self-contained institution violate the due process and equal protection provisions of the Fourteenth Amendment? In other words, will our constitutional due process and equal protection provisions stand mute to the automatic infliction of punishment by statute?

CONSTITUTIONAL PROVISIONS

"No State shall . . . pass any bill of attainder . . ."

Article I, § 10,
Constitution of United States

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV,
Constitution of United States

STATEMENT OF THE CASE

In November, 1958, Petitioner was elected to a four year term as Judge of Department Two of the Municipal Court of the City of Seattle. Department two is the Traffic Court. Petitioner thereafter qualified by filing his official bond, taking his official oath and assuming his duties as Municipal Judge.

In August of 1960 Petitioner was, by Information, charged with the crime of assault in the second degree. This was a felony charge of assault with intent to commit rape.

A jury trial was held on said charge and in December of 1960 the jury returned a verdict of guilty. Motions for a new trial were wrongfully denied. Judgment and sentence followed in February, 1961. The sentence imposed was ten years in the state penitentiary, suspended on condition Petitioner resign his public office within forty-eight hours. Petitioner refused and appealed. The case was reversed. It was later dsmissed over Petitioner's objection.

In March of 1961 the Respondent herein commenced quo warranto proceedings to oust Petitioner from office. These proceedings were resisted. They are the proceedings precipitating the present petition.

In the quo warranto proceeding the trial court ruled that the statute RCW 9.92.120, supra and infra, created an automatic forfeiture of Petitioner's public office and, consequently, left the same vacant. The trial court thereafter granted Summary Judgment declaring the office forfeited and ousted Petitioner therefrom.

Petitioner appealed and on appeal presented several questions among which were the two now presented in this petition.

FEDERAL QUESTIONS

Federal questions were presented to the trial court by way of argument on special appearance, prior to the entry of the judgment of forfeiture and ouster.

These questions were amplified and specifically assigned as error on appeal.

The federal questions herein presented were properly and timely raised and presented to the Washington Supreme Court by assignments of error and specific oral arguments and specific written arguments in Petititoner's appellate brief. Further, the Washington Court passed upon same.

The question raised and now presented concerning the statute being a bill of attainder was passed upon and answered thusly:

> "The appellant contends the statute, supra, is a bill of attainder which violates Article 1 § 9 of the United States Constitution in that it imposes a legislative penalty without due process of law.
>
> As heretofore stated, the statute relates only to a person's rights in a criminal proceeding. The statute does not contravene this provision of our federal constitution." (*State v. Simmons* 377 P. 2nd 421, set out in Appendix)

It is here noted that the Washington Court refers to Article 1 § 9 rather than Article 1 § 10. The provisions of § 10 were raised and argued. Why the Washington Court refers to Article 1 § 9 in lieu of Article 1 § 10 is unknown.

The question now raised in this petition concerning due process and equal protection of the laws was also passed upon. It was answered as follows:

> "RCW 9.92.120, in no manner denies one holding public office the right of these constitutional guarantees. It relates only to the qualifications of

a person to hold public office . . . and, applies equally to all persons holding public office except those liable for removal by impeachment." (*State v. Simmons* 377 P. 2nd 421, set forth in Appendix)

ARGUMENT

The State of Washington has, as law, the following statute:

> "The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state." (Revised Code of Washington 9.92.-120)

Petitioner claims this statute is a bill of attainder and, as such, violates Art. 1 § 10 of the federal constitution. In searching the law we find very few cases involving bills of attainder. Among these, however, are two important decisions from the U. S. Supreme Court. The first is *Cummings v. The State of Missouri* 4 U.S. (Wallace) 277, decided in 1866; and the second is *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073, decided in 1946.

From a careful reading and study of these two cases we may perceive and determine with certainty the meaning of the phrase "bill of attainder," the applicability of same to appropriate situations and the wisdom of the existence of such a constitutional provision. These two U. S. decisions are the result of considerable thought—they reach to the rudimentary depths of constitutional law. They should not be taken lightly. The latter decision refers to the former as "an illuminating opinion."

These two cases clearly reveal that the above quoted statute comes within that evil our federal constitution seeks to avoid by prohibiting states passing bills of attainder. These two cases were presented to the Washington Court, in connection with this question. They were quoted at length in the appellate brief and the Washington Court failed to adhere to same. These two cases have pre-determined with exactness the correct result which should follow any issue concerning a bill of attainder but the Washington Court did not understand same.

In *Cummings v. Missouri*, the U. S. Supreme Court said:

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any right, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment."
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in pursuit of

happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment and can be in no otherwise defined.

"Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivations or suspension of political or civil rights, . . ."

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of a trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

"These bills are generally directed against individuals by name; but they may be directed against a whole class."

"These bills may inflict punishment absolutely, or may inflict it conditionally."

"The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing not the name. It intended that the rights of a citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised."

In *United States v. Lovett*, the U. S. Supreme Court said:

> To quote Alexander Hamilton: '* * * * a limited constitution * * * * (is) one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.' Federalist Paper No. 78."
>
> "In an illuminating opinion which gave the historical background of the Constitutional prohibition against bills of attainder, this court invalidated the Missouri constitutonal provision both because it constituted a bill of attainder and because it had an *ex post facto* operation . . . Neither of these cases [*Cummings v. Missouri* and *Ex Parte Garland* 4 U. S. (Wallace) 333] has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it."

Petitioner submits, that if these two decisions are read with care the reader will find it difficult to render the issues more precise or the meaning more clear.

The Washington Court, as noted, also had the question of whether or not RCW 9.92.120 denied Petitioner due process and equal protection of the laws, as guar-

anteed by the Fourteenth Amendment. Petitioner claims that summary enforcement of the statute denied him due process of law and equal protection of the laws.

There is no doubt but what RCW 9.92.120 purports to impose severe and drastic penalties. By its terms it declares: ". . . in addition to such other penalty . . ." And, it appears to serve no other purpose.

Petitioner's position concerning deprivation of due process and equal protection of the laws is simply this:

It is not constitutional in a criminal trial to deprive the defendant, through abuse of judicial discretion, of an impartial jury; to deprive him, through abuse of judicial discretion, of the right to introduce material evidence; to, over adequate objections, allow prosecutors to ask questions "which were obviously designed to prejudice" and were "completely inexcusable and can have no conceivable justification;" and, to deny him "any semblance of a fair trial" and thereafter conclude that a valid conviction results. (cf: *State v. Simmons* 59 Wn. (2d) 381, 368 P. 2d 378)

It is not justice to take such a "conviction" and declare the same, without further concern, to have force enough to give automatic life to the provisions of RCW 9.92.120.

Such a conviction is not born of due process or equal protection of the laws but, on the contrary, is totally void of these life giving essentials and, consequently, cannot breathe this life of justice into any statute or proceeding. Any statute or proceeding based thereon

must needs be without constitutional life.

The Washington Supreme Court declared that Petitioner's criminal trial bore no "semblance of a fair trial." (*State v. Simmons* 59 Wn. (2d) 381, 368 P. 2d 378) Of the twenty assignments of error in Petitioner's criminal appeal, the Washington Court said: "At least half of the twenty assignments of error on this appeal have some merit." (Ibid.) One of the jurors concealed facts on voir dire examination and concerning this juror the Washington Court said: ". . . no defense counsel in his right mind would have permitted her to remain on the jury had he known of it." (Ibid.)

The due process issue in the instant case is not unlike that in *Kennedy v. Mendoza-Martinez*, 83 S. Ct. 554 (1963) where the Court said:

> "That issue is whether the statutes here, which automatically—without prior court or administrative proceedings, forfeit citizenship, are essentially penal in character, and consequently, have deprived appellees of their citizenship without due process of law . . ."

It might be asserted, in the instant case, that Petitioner was afforded a prior court proceeding. But, how does a rational judicial mind correlate, with harmony, the mischievous conviction referred to and the following passage from *State v. Simmons* 377 P. 2d 121, in Appendix:

> ". . . The statute . . . is unrelated to a person's rights in a criminal proceeding."

The Washington Court, by these words, has said, in effect, go thither with your rights in the criminal case, however, so far as necessary we will use the result of

the criminal proceeding to give effect to the statute. Is this justice?

The Washington Court has also declared:

> "The quo warranto proceeding judicially determined that the qualifications had not been met to permit his further continuance in office. He was afforded due process by this determination." (*State v. Simmons* 377 p. 2d 421, in Appendix)

Here, again, the Washington Court seeks to justify a judicial determination using the criminal case as its premise. A determination is but a conclusion and must be based on due process. The determination, as such, is not due process—it is but a result.

CONCLUSION

Petitioner submits that the federal questions here presented were properly before the Washington Supreme Court; were directly ruled upon by that Court and, that the rulings thereon conflict with the federal constitutional provisions hereinabove alluded to as well as the decisions of the U. S. Supreme Court. Further, that it would be reasonable for this Court to exercise its discretion in favor of granting this Petition.

Respectfully submitted.

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APPENDIX

State v. Simmons 377 P. 2d 421
(Formal parts omitted)

The respondent William H. Simmons, Judge of the Municipal Court of the City of Seattle, was convicted of the crime of assault in the second degree by jury trial on December 7, 1960. Judgment and sentence was entered on February 21, 1961. A twenty days' notice and summons and an information in quo warranto were served upon the respondent and were filed on March 7, 1961.

On the same day, an ex parte application by the relator State of Washington for an order to restrain the respondent temporarily from acting as municipal court judge was made to the Superior Court for King County. It was supported by an affidavit stating that the respondent had been convicted of the crime of second-degree assault and that he had forfeited his office under RCW 9.92.120 by reason of the conviction. An order was issued and served upon the respondent directing him to show cause on the following day why he should not be restrained from performing the duties of his office pending the final determination of the issues in the quo warranto proceeding.

On March 8, 1961, the respondent appeared personally and moved to quash the order to show cause for the reason that the court had no jurisdiction to issue the order. The motion was orally denied. Pursuant to a hearing upon the show cause order a temporary injunction was entered on March 9, 1961, restraining the

respondent from the performance of the duties of his office.

On March 27, 1961, the respondent served and filed certain motions challenging the sufficiency of the information and sought to have certain portions of the information stricken and to require the relator to make an election as to whether the quo warranto proceeding was brought to determine the authority of respondent to hold his office, to oust the respondent from his office, or because the respondent had failed to vacate his office. Respondent further moved that the quo warranto proceeding be dismissed for failure to join an indispensable party.

On March 28, 1961, the relator filed a motion for summary judgment, as a matter of law upon the pleadings, supported by affidavit stating there was no issue of fact present in the cause.

On April 3, 1961, the respondent's motions were brought on for hearing. The ruling on the motion to dismiss for lack of jurisdiction over the respondent was reserved until 9 a.m. on April 7, 1961. The remainder of the motions were denied except the motion to strike certain paragraphs from the quo warranto information which was granted, but which is not raised as an issue on this appeal.

On April 7, 1961, the motion to dismiss for lack of jurisdiction over the respondent was denied.

On April 11, 1961, the respondent filed the following objections to the summar judgment proceedings:

> "1. The Court has no jurisdiction of the subject matter of the cause.

"2. The Relator's motion is not timely in that Respondent's motions heretofore filed and served remain undisposed of.

"3. The affidavit in support of Relator's motion for summary judgment does not establish a basis for entry of summary judgment."

On April 14, 1961, relator served and filed notice of presentation of order granting summary judgment, findings of fact and judgment of ouster to be heard on April 20, 1961. On April 20, without taking testimony, the relator's motion for summary judgment was granted and the court entered findings of fact, conclusions of law and judgment forfeiting the respondent's office and ousting him thereof. The respondent appeals.

The appellant (respondent below) contends the trial court failed to follow the statutory procedure when it issued the order to show cause and entered the order granting a temporary injunction.

This was an appealable order. Rule on Appeal 14(3), RCW Vol. 0. No appeal was timely taken and, therefore, we have no jurisdiction to review the order. *Lewis Pacific Dairymen's Ass'n v. Turner*, 50 Wn. (2d) 762, 314 P. (2d) 625 (1957). The temporary injunction was also merged in the final judgment and any question as to the propriety of the entry of such an order is now moot. *Valentine v. Valentine*, 31 Wn. (2d) 650, 198 P. (2d) 494 (1948).

The appellant contends the trial court erred in entering findings of fact and conclusions of law in conjunction with the summary judgment. We agree that findings of fact and conclusions of law were unneces-

sary; however, they were merely superfluous and of no prejudice to the appellant.

The appellant contends he was denied due process under Art. 1, § 3, of the state constitution and under the Fourteenth Amendment to the United States Constitution in that he was denied ten additional days in which to answer after the court's disposition of his motions, as provided in Rule of Pleading, Practice and Procedure 12 (a), RCW Vol. O.

This rule is not applicable to a summary judgment proceeding. Under Rule of Pleading, Practice and Procedure 56 (a), RCW Vol. O, a motion for summary judgment may be made at any time after the expiration of the period within which the defendant is required to appear. See 3 Barron & Holtzoff, Federal Practice and Procedure § 1233. The motion for summary judgment was made subsequent to this period, and the order, therefore, is valid since its validity is determined by the period in which the defendant must *appear* and not by the period in which he must answer.

The appellant contends the following statute, relied upon by the trial court in entering the judgment removing appellant from office, is unconstitutional in that it denies the appellant the right to appeal, as guaranteed by Art. I § 22, of our state constitution. RCW 9.92.120 provides:

> "The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state."

This same question was squarely passed upon by this court, in a divided opinion, in *State ex rel. Zempel v. Twitchell*, 159 Wash. Dec. 437, 367 P. (2d) 985 (1962). The rule in that case is the law of this state and is controlling here since the majority of the court adhere to the views therein expressed. In the majority opinion, we held that the guarantee to right of appeal in Art. I § 22, of the state constitution, is limited to criminal cases; that a quo warranto proceeding is not a criminal case; that the statute is based on sound public policy; and that one of the qualifications for holding an office of public trust is that one may not be convicted "'of any offense involving a violation of his official oath.'" RCW 42.12.010. The qualification is more specifically spelled out in RCW 9.92.120, *supra*. One may not hold office upon the conviction of a felony. As we stated in *State ex rel. Guthrie v. Chapman*, 187 Wash. 327, 60 P. (2d) 245 (1936), cited in *State ex rel. Zempel v. Twitchell*, *supra*:

> "'*The conviction of grand larceny carried with it, and imposed upon the relator, as a necessary and immediate accompaniment, the forfeiture of his office and, at the same time, created a vacancy in that office.* The judgment of ouster constituted a judicial determination of the facts made by the record of relator's conviction and also a legal declaration of his status with respect to the office formerly held by him. That judgment was self-executing and, by its own force and without the aid of process or further action of the court, accomplished the object sought to be obtained by the statute, which was the immediate and effectual divestiture of the relator of all official authority whatever.' (Italics ours.)"

Appellant contends that RCW 9.92.120, *supra*, is in

derogation of Art. 1 § 3, of the state constitution providing that "'No person shall be deprived of life, liberty, or property, without due process of law."

This contention is answered by the reasoning of the *Twitchell* case, *supra*. The appellant's right to hold public office is subject to qualifications imposed by the legislature. His office was forfeited, under the statute, upon his criminal conviction by jury trial in the superior court.

The quo warranto proceeding judicially determined that the qualifications had not been met to permit his further continuance in office. He was afforded due process by this determination.

Appellant contends that RCW 9.92.120 contravenes Art. 1 §§ 21 and 22, of the state constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution:

> "The right of trial by jury shall remain inviolate. . . ." Art. 1, § 21.
>
> "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury . . ." Art. 1 § 22.
>
> ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Fourteenth Amendment.

RCW 9.92.120, in no manner, denies one holding public office the right to these constitutional guarantees. It relates only to the qualifications of a person to hold public office. *Twitchell*, *supra*, and applies equally to all persons holding public office except

those liable for removal by impeachment. Const. Art. 5, §§ 1, 2, 3.

The appellant contends the statute, *supra*, is a bill of attainder which violates Art. 1, § 9, of the United States Constitution in that it imposes a legislative penalty without due process of law.

As heretofore stated, the statute relates only to one's qualifications to hold public office and is unrelated to a person's rights in a criminal proceeding. The statute does not contravene this provision of our federal constitution.

The appellant's final contention is that the Municipal Court of Seattle is a court of record and that judges of courts of record may be removed from office only by impeachment under Art. 5, §§ 1 and 2, of the state constitution.

The Municipal Court of Seattle, as pointed out by the appellant, has various attributes of a court of record, but we are satisfied it does not come within this classification.

Only the legislature, under our constitution, may establish the inferior courts of this state and shall have power to provide that such courts, other than justice courts, shall be courts of record. Const. Art. 4, §§ 1 and 11. We believe that, had the legislature intended to establish the municipal courts of this state as courts of record, they would have been so designated. Moreover, no record is kept of the verbatim testimony in the trial proceedings of a municipal court; none was so intended by our legislative body

because, in an appeal from the municipal court, the superior court is not permitted to review the municipal court's proceedings. The case is there tried de novo as if it were an original proceeding. We, therefore, hold the appellant was not a judge of a court of record.

We find the judgment of the trial court in the quo warranto proceeding removing the appellant from office to have been validly entered. It is therefore affirmed.

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BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Washington State Supreme Court *State ex rel. Carroll v. Simmons* is reported at 161 Wash. Dec. 144, 61 Wn.(2d) ....., 377 P.(2d) 421. App. p. 13 of petition. The opinion was filed December 27, 1962.

JURISDICTION

Petitioner contends that jurisdiction to review the judgment of the Washington State Supreme Court is conferred on this court by 28 U.S.C. 1257. However, that statute does not confer jurisdiction on this court to hear moot questions. As petitioner states at pages 2 and 3 of his petition, he was elected in November, 1958, to a four-year term of office and was ousted from office by *quo warranto* proceedings in 1961. The official records of the King County Auditor show that in 1962,

petitioner filed and ran for election for the term of office following the term for which petitioner was elected in 1958; that petitioner was defeated in the primary election held September 11, 1962; and that the successor to the term for which petitioner was elected in 1958 has been elected and qualified and taken office (King County Auditor File Numbers 38935, 3591462, 3910041, 39225, 4247298, Official Canvas of Elections for 1962).

Hence, it appears that the question presented here was moot before the petition herein was filed in April, 1963. There is nothing now in controversy in this case because the term of office in issue has ceased to exist. Under these circumstances, this court can do no more than declare principles or rules of law for the government of future cases which cannot affect the result as to the thing in issue in this case. This the court will not do. *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.ed. 747; *U. S. v. Hamburg Amerikanische Packet-Fahrt-Artien Gellschaft*, 239 U.S. 466, 475-476, 36 S.Ct. 212, 60 L.ed. 387; *U. S. v. Alaska S. S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.ed. 808; *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 61 L.ed. 722.

For these reasons, it is respectfully suggested that this court does not have jurisdiction to review the instant case for the reason that it became moot prior to the time the petition for certiorari herein was filed.

QUESTION PRESENTED

When an elected municipal judge becomes disqualified for his elective office for the reason that he has been convicted of a felony and is ousted from that office in

a judicial trial held according to long standing statutory *quo warranto* procedures is the statute defining the disqualification a bill of attainder under the United States Constitution, or the judicial trial a violation of the due process and equal protection clause of the 14th Amendment to the Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

"No State shall . . . pass any bill of attainder . . ." Article I, § 10, Constitution of United States.

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, Constitution of United States.

Section 7.56.010 of the Revised Code of Washington provides as follows:

"*Against whom information may be filed.* An information may be filed against any person or corporation in the following cases:

"(1) When any person shall usurp, intrude upon, or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state.

"(2) When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office.

"(3) When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise.

"(4) When any association or number of persons shall act within this state as a corporation, without being legally incorporated.

"(5) Or where any corporation do, or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law."

Section 7.56.100 of the Revised Code of Washington provides as follows:

"*Judgment of ouster or forfeiture.* Whenever any defendant shall be found guilty of any usurpation of or intrusion into, or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, or when any association or number of persons shall be found guilty of having acted as a corporation without having been legally incorporated, the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise or corporate rights, and in case of corporations that the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff."

Section 9.92.120 of the Revised Code of Washington provides as follows:

"*Conviction of public officer forfeits trust.* The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state."

STATEMENT OF THE CASE

In November, 1958, petitioner was elected to a four-year term of office as municipal judge for the City of Seattle.

On February 21, 1961, petitioner was sentenced to not more than ten years in the Washington State Penitentiary for the crime of Assault in the Second Degree. That conviction was appealed.

On March 7, 1961, while the appeal from the above felony conviction was pending, the *quo warranto* proceedings in the instant case were commenced, and petitioner was ousted from office in those proceedings on April 20, 1961.

On May 19, 1961, petitioner gave notice of appeal from the *quo warranto* judgment. Petitioner did not perfect that appeal until he filed his brief, eleven months after the *quo warranto* judgment, on March 19, 1962.

On December 27, 1962, the Washington State Supreme Court filed its opinion affirming the trial court's judgment in the *quo warranto* proceedings.

ARGUMENT

Since the disability created by RCW 9.92.120 was imposed on petitioner only by means of a judicial trial, this statute is not a bill of attainder. A bill of attainder is defined in *U. S. v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1945). In that opinion at page 315, it is held:

> "... that legislative acts, no matter what their form, that apply either to named individuals or to

> easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The following history of the proceedings in petitioner's trial in the *quo warranto* action (which is related in the appendix of petitioner's brief at pages 13 to 15, and in the opinion below, 161 Wash. Dec. 144, 377 P. (2d) 421) shows that petitioner, in the *quo warranto* proceedings, had a full scale judicial trial on the issues.

> "The . . . [petitioner] William H. Simmons, Judge of the Municipal Court of the City of Seattle, was convicted of the crime of assault in the second degree by jury trial on December 7, 1960. Judgment and sentence was entered on February 21, 1961. A twenty days' notice and summons and an information in *quo warranto* were served upon the . . . [petitioner] and were filed on March 7, 1961.
>
> "On the same day, an *ex parte* application by the . . . [respondent] State of Washington for an order to restrain the . . . [petitioner] temporarily from acting as municipal court judge was made to the Superior Court for King County. It was supported by an affidavit stating that the . . . [petitioner] had been convicted of the crime of second-degree assault and that he had forfeited his office under RCW 9.92.120 by reason of the conviction. An order was issued and served upon the . . . [petitioner] directing him to show cause on the following day why he should not be restrained from performing the duties of his office pending the final determination of the issues in the *quo warranto* proceeding.
>
> "On March 8, 1961, the . . . [petitioner] appeared

personally and moved to quash the order to show cause for the reason that the court had no jurisdiction to issue the order. The motion was orally denied. Pursuant to a hearing upon the show cause order a temporary injunction was entered on March 9, 1961, restraining the . . . [petitioner] from the performance of the duties of his office.

"On March 27, 1961, the . . . [petitioner] served and filed certain motions challenging the sufficiency of the information and sought to have certain portions of the information stricken and to require the . . . [respondent] to make an election as to whether the *quo warranto* proceeding was brought to determine the authority of . . . [petitioner] to hold his office, to oust the . . . [petitioner] from his office, or because the . . . [petitioner] had failed to vacate his office. . . . [Petitioner] further moved that the *quo warranto* proceeding be dismissed for failure to join an indispensable party.

"On March 28, 1961, the . . . [respondent] filed a motion for summary judgment, as a matter of law upon the pleadings, supported by affidavit stating there was no issue of fact present in the cause.

"On April 3, 1961, the . . . [petitioner's] motions were brought on for hearing. The ruling on the motion to dismiss for lack of jurisdiction over the . . . [petitioner] was reserved until 9 a.m. on April 7, 1961. The remainder of the motions were denied except the motion to strike certain paragraphs from the *quo warranto* information which was granted, but which is not raised as an issue on this appeal.

"On April 7, 1961, the motion to dismiss for lack of jurisdiction over the . . . [petitioner] was denied.

"On April 11, 1961, the . . . [petitioner] filed

the following objections to the summary judgment proceedings:

"'1. The Court has no jurisdiction of the subject matter of the cause.

"'2. The . . . [respondent's] motion is not timely in that . . . [petitioner's] motions heretofore filed and served remain undisposed of.

"'3. The affidavit in support of . . . [respondent's] motion for summary judgment does not establish a basis for entry of summary judgment.'

"On April 14, 1961 . . . [respondent] served and filed notice of presentation of order granting summary judgment, findings of fact and judgment of ouster to be heard on April 20, 1961. On April 20, without taking testimony, the . . . [respondent's] motion for summary judgment was granted and the court entered findings of fact, conclusions of law and judgment forfeiting the . . . [petitioner's] office and ousting him thereof."

Clearly the above history, with which petitioner has no quarrel conclusively shows that the proceedings complained of were in no way ". . . a legislative act which inflicts punishment without a judicial trial." *Cummings v. Mo.*, 4 Wall. 277, 323, 71 U.S. 277 (1866).

Further indication that RCW 9.92.120 is not a bill of attainder is found in RCW 7.56.010, which provides *inter alia*:

"*Against whom information may be filed.* An information may be filed against any person or corporation in the following cases:

"* * * *

"(2) When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office."

And in RCW 7.56.100, which provides *inter alia*:

> "*Judgment of ouster or forfeiture*. . . . when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, . . . the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office. . . ."

Clearly Washington law contemplates that RCW 9.92.120 shall be implemented only by voluntary vacation of office or by a judicial trial held according to the appropriate *quo warranto* procedures. Petitioner makes no claim that the *quo warranto* statutes are invalid nor that the procedures prescribed therein were not followed.

In the instant case, there is no question of a denial of due process since petitioner had notice and an opportunity to be heard before the Superior Court of the State of Washington in and for King County, which is a court of record in the state of Washington. That the petitioner took full advantage of this notice and opportunity to be heard is amply shown by the recitation of his maneuvers and appearances set out above and in the Washington State Supreme Court opinion for which review is sought, 161 Wash. Dec. 144, 145-147, 377 P.(2d) 421 (App. pp. 13-15 of petition). So, also, has petitioner received equal protection of the law in this case. The procedures and rules followed herein are identical to those which have been followed in Washington ever since the legislature in 1909 enacted this disqualification for holding public office. *State ex rel. Zempel v. Twitchell*, 59 Wn.(2d) 419, 367 P.(2d) 985

(1962); *State ex rel. Knabb v. Frater*, 198 Wash. 675, 89 P.(2d) 1046 (1959); *State ex rel. Guthrie v. Chapman*, 187 Wash. 327, 60 P.(2d) 245 (1936).

CONCLUSION

First, the petition itself shows there is no controversy because the case has become moot and, second, the petition has failed to indicate any violation of the Federal Constitution, therefore it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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